Supreme Court, U. S.
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SUPREME COURT OF THE
UNITED STATES OF AMERICA

No.....77-1099
October Term, 1977

MYRON BUTTRAM,

Petitioner

v.

UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. . . . . .

MYRON BUTTRAM, Petitioner

vs.

UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Myron Buttram, Petitioner, by his attorney, Roger S. Hanson, Esq., a member of the Bar of the United States Supreme Court, hereby petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review an "Order" of that court entered January 6, 1978 affirming petitoner's conviction of violation of 18 U.S.C. 1343 and/or 18 U.S.C. 2, interstate fraud by telephone and/or aiding and abetting same.

While the U.S. 3rd Circuit was fully briefed, the court declined to analyze the issues, and affirmed petitioner's conviction suffered in the U. S. District Court for the Western District of Pennsylvania without citation of any authority whatsoever, and without analysis.

Done this 1st day of February, 1978, at Santa Ana, California.

Respectfully Submitted,

ROGER S. HANSON
Attorney for Petitioner
Member of the Bar
U. S. Supreme Court

Pursuant to applicable Rules of this Honorable Court, Petitioner submits the following:

(a)

OPINION BELOW

The U.S. District Court in the Western District of Pennsylvania, the Honorable William W. Knox, Trial Judge, in denying a motion for a new trial caused to be published a Memorandum Opinion, **United States v. Myron Buttran**, 432 F. Supp 1269 (W.D.Pa. 1977)

A copy of that opinion is attached as Appendix "A".

The U.S. Court of Appeals for the 3rd Circuit affirmed this conviction although that court was fully briefed by both petitioner and the government in a 1 page "Order" without analysis of the severe Federal Constitutional Issues and without Citation of any authority whatsoever on January 6, 1978.

A copy of that opinion is attached as Exhibit "B" in this petition for Writ of Certiorari.

(b)

JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is involved are:

(i) the date that the judgment/order which is sought to be reviewed was entered is January 6, 1978;

(ii) no petition for rehearing was made.

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1254(d) which provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (d) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . "

Jurisdiction of this Honorable Court is further invoked because the decisions of the U.S. 3rd Circuit in this case of a charge of Interstate Telephone Fraud is in conflict with the decisions of at least the 2d Circuit in the case United States v. Buren, 305 F. 2d 527 (2d Cir. 1962) and the 6th Circuit in United States v. Rabinowitz, 327 F. 2d 62 (6th Cir. 1964), and further, as a matter of fact and as a matter of law in the instant case the uncontroverted evidence presented by the Chief Government Witness, Mr. J. Robert Baldwin and Agents of the U.S. Federal Bureau of Investigation (F.B.I.) and other Government and Defense witnesses was that no investment money was to pass hands unless and until the potential investor had attended a scientific demonstration of the equipment involved, had seen it operate and had seen it produce to the satisfaction of the investor. In the case at bar, the purported victim suffered no loss.

Jurisdiction of this Honorable Court is further invoked under this Honorable Court's Supervisory Powers over the lower Federal Courts because the U.S. District Court for the Western District of Pennsylvania and the U.S. 3rd Circuit have erroneously sanctioned:

(a) the use of a medically insane man's testimony placed into evidence by a government witness, without the government calling the medically insane man to

allow defense confrontation and cross-examination, where U.S. Government psychiatrists were called as witnesses and testified to the medical insanity of the man in question both at the time he made the interstate telephone calls and of his continuing insanity at the time of petitioners trial.

The government witnesses attributed statements made by the insane man, implicating petitioner Buttram in a purported interstate fraud by telephone, to petitioner Buttram via the unconfronted hearsay of the insane man, one Frank Kinney Exum, in violation of the 6th Amendment to the U. S. Constitution, and in violation of the principles of **Dutton v. Evans**, 400 U.S. 74.

(b) the use of a one-man voice "show-up" before the jury at petitioner's trial, where petitioner was required to speak certain words in open court so that the chief government witness could purportedly identify petitioner's voice as the speaker in a phone conversation of a few minutes duration which he had heard approximately one year previously in violation of the principles of **Stovall v. Denno**, 388 U.S. 293.

(c) a conviction of Interstate Wire Fraud one count, where as a matter of fact and as a matter of law there could be no fraud because all government witnesses and defense witnesses agreed that a potential investor

in the scientific apparatus was to not invest until he had witnessed a demonstration of the scientific device and was fully satisfied that it was capable of producing and performing as represented by petitioner.

(d) the failure to, **sua sponte**, instruct that the words and acts of the medically insane man, Frank Kinney Exum, were not binding upon the petitioner Myron Buttrum if the jury determined (as they did in acquitting Petitioner Buttram of all save one count) that **Exum** was not the agent of Buttram, and where said failure to instruct the jury, **sua sponte** is **plain error** under the Federal Rules of Criminal Procedure 52 and under **Chapman v. California**, 386 U.S. 18, 24, it cannot be said that the error did not contribute to the conviction.

(c)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the evidence supported the government's allegation that Buttram sought to defraud J. Robert Baldwin on October 8, 1975 when Buttram talked to Baldwin on the telephone for a few minutes in view of

(a.) the fact that government witnesses **J. Robert Baldwin**, **John Paul Bokal**, and **Barbara Smith** and defense witnesses **Dr. Richard Wesley** and **Myron**

Buttram all testified that Baldwin was to invest nothing unless and until he had personally witnessed a test, had an assay completed, and had become fully satisfied with the capabilities of the E-H precipitator and satisfied with a well;

(b.) the fact that Buttram was given Government's Exhibit 1 with the words "Remarks: Assay Ton" circled, and with the remarks "1 milligram equals 1 ounce" written thereon by Dr. Richard Wesley, and where Buttram did not understand the concept of **Assay Ton** and checked its meaning both with **Dr. Richard Wesley**, the machine's inventor, and by examination of **Peales Mining Engineers Handbook** and verified the concept, and where Buttram used Wesley's projection of 60,000 gallons per day;

(c.) the fact that Buttram personally placed some $90,000 into the project and borrowed $160,000 on a personal valuable painting even after he had been arrested, thus demonstrating his belief in the project;

(d.) the fact that Buttram so believed in the potential of the Jack Maisson well that when it became irrevocably capped, he spent $15,000 to drill a parallel well;

(e.) the fact that he spent in excess of a year on the Nyland site and on steps leading to erecting the equipment thereon without a personal salary;

(f.) the fact that he looked for technical advice to Dr. Richard Wesley who did not realize the error in the Government Exhibit 1, and whether only a mere suspicion was raised, requiring that the jury's conviction be set aside as not being based on evidence that convinces beyond a reasonable doubt within the meaning of **In Re Winship**, 397 U. S. 358, 363-364?

2. Whether Buttram was denied his right under the 6th Amendment to confront Frank Kinney Exum on the "crucial to the government and impacting on the defense" hearsay statements of Exum introduced before the jury without cross-examination thereon by J. Robert Baldwin and John Paul Bokal, concerning the contents of the October 1 and October 4, 1975 telephone conversations, which were admitted under no known nor recognized exception to the hearsay rule, and where the jury acquitted Buttram of the Counts 1 and 2 of October 1 and October 4, 1975 telephone calls, and where no limiting instruction was given by the trial court to the jury that the hearsay evidence was not to be used to evaluate or add substance or weight to the determination of the guilt-innocence determination on the merits of the October 8, 1975 telephone conversations?

3. Whether a lay jury could ever compartmentalize its mind, even had jury instructions been given, to

disregard all hearsay evidence of the October 1 and October 4, 1975 telephone conversations and make them ineffective to evaluate the merits of the guilt-innocence determination on the Count III, October 8, 1975 telephone conversation?

4. Whether, if the contents of the October 1 and October 4, 1975 telephone conversations are disregarded, as they now must be as to proof of the truth of the matter that they assert, does the remaining evidence of whatever was said on the October 8, 1975 telephone call by Buttram show, beyond a reasonable doubt, a scheme or plan or artifice to defraud J. Robert Baldwin by interstate telephone?

5. Whether the Court should have provided separate jury instructions and jury verdicts for the allegedly two (2) separate counts governing the telephone call of October 8, 1975, i.e., for 18 U. S. C. 1343 and 18 U. S. C. 2, aiding and abetting, and whether it can today be ascertained what Buttram was convicted of?

6. Whether, as a matter of law, Buttram could be convicted of "aiding and abetting" **Frank K. Exum** who legally could not be able to commit a crime?

7. Whether the jury's determination of the issue of fact that Buttram was not in a principal-agent relationship with **Exum**, that **Buttram** did not authorize

Exum's acts, at least prior to the October 8, 1976 phone call, and that Exum was not the "tool" of Buttram, did not create as a collateral estoppel that such did not exist as to the October 8, 1975 phone call, within the general rationale of Ashe v. Swenson, 397 U. S. 436?

(d)

UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED

FIFTH AMENDMENT

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assitance of Counsel for his defence.

(e)

SUMMARY STATEMENT OF FACTS WITHOUT REFERENCE TO REPORTER'S TRANSCRIPT ON APPEAL

The Government prosecuted **Frank Kinney Exum** and **Myron Buttram** for allegedly making interstate telephone calls from **Texas** and **California** to Erie Pennsylvania with the intent to defraud one **J. Robert Baldwin** of $175,000, allegedly seeking to get **Baldwin** to invest in a device allegedly capable of extracting precious metals from allegedly rich thermal well waters of the Imperial Valley of California.

Three separate phone calls were charged, one on October 1, 1975 and one on October 4, 1975 made by Exum personally from Texas to Erie, Pa., at a time when Buttram was not present, and a third call made by Baldwin from Anaheim, California to Erie, Pa. that Exum initially talked on, but where he was subsequently joined by Buttram after Exum introduced Buttram to Baldwin when Exum concluded his discussions with Baldwin.

The evidence indicated that one Dr. Richard Wesley had invented a machine called an "electro-hydraulic precipitator" that caused rare metals to be precipitated from mineral-rich water.

Dr. Wesley and Dr. Frank Sodrey, Ph.D. in organic chemistry from Ohio State University testified, and their testimony was not controverted, that the device worked and was as good as the mineral content of the water run through it; whatever metallic material was in the water would be swept out by the massive capacitor discharge, but if the water was mineraless, of course the device removed nothing. Dr. Sodrey was a government-called expert witness, and there can be no serious contentions that the device is fraudulent. In fact, U.S. Government patents have been issued on the concept itself to Richard Wesley.

The evidence indicated that in September, 1975

Richard Wesley submitted samples of water drawn from a so-called "Jack Massion" well near Nyland, California to the Silver State Mineral Testing Laboratory in Las Vegas, Nevada which had been operated by one **Julius Bonnochi**, a recognized assayer. Bonnochi produced an assay report for Richard Wesley introduced into evidence as Government Exhibit 1. Written on the report, in close proximity to the figures, were the remarks: "**Assay Ton.**" Expert evidence indicated that the word "Assay Ton" meant some 29.1666 grams of material, an amount specifically so chosen such that the number of **milligrams** of a rare metal found in an assay ton allowed one to state that the same number of **Troy ounces** of that rare metal would be contained in an avoirdupois ton of 2000 lbs.

Richard Wesley testified that when he received the Government Exhibit 1 from Julius Bonnochi with the words "Remarks: Assay Ton" thereon, he assumed that the numerical values meant that what was indicated was that number of **milligrams** in an **Assay Ton** of testing material, which he learned and understood allowed the direct conversion into troy ounces per avoirdupois ton. He then wrote on Government Exhibit 1 "1 oz = 1 milligram" and mailed the original of Government 1 to **Myron Buttram**. **Buttram** did not know what he meant by the foregoing

equality, telephoned **Wesley** and **Wesley** explained to **Buttram** what it meant. Thereafter, based on projected prognosis that **Wesley's** invention could process 60,000 gallons of water per day and based on then-existing gold and silver values, Mr. **Buttram's** calculations showed a potential recovery of some $283,000.00 per day. If four units were hooked into the Jack Massion well, about $1 million per day would be expected.

Based on a passing and transient acquaintance that **Buttram** established with **Frank Exum** many years ago, and based on a transient comment to **Exum** about the optimistic projections of the **Wesley device, Exum** became so exuberant that he talked **Buttram** into giving a percentage of each device if he, Exum, could obtain investors. Fully on his own, and based on a contact he had obtained from a previous oil-well sale job he had had with the La Prada Oil Companies, **Exum** telephoned one **J. Robert Baldwin** in Erie, Pennsylvania from Texas. Exum set forth and Baldwin so testified about this hearsay of "crucial to the government and impacting on the defense" nature concerning the alleged capability of the machine. Baldwin did not believe **Exum**; he assumed **Exum** was trying to defraud him, and called the Erie, Pennsylvania office of the F.B.I., reaching resident agent, **John Paul Bokal**. Together **Bokal** and **Baldwin**

placed phone calls solely to **Exum**, leading the mentally deranged and legally insane man into flights into Fantasyland about tremendous financial holdings of **Myron Buttram** as well as the alleged capability of the machine.

Federal psychiatrists diagnosed **Exum** as so mentally ill that he could not be legally responsible for his acts in making the telephone calls of October 1, October 4, and October 8, 1975, nor was he capable now of understanding the criminal proceedings taken against him. All matters then pending in the U.S. District Court in Erie in the instant case were dismissed and Buttram alone stood trial.

Over defense objections that **Buttram** could not **conspire** with a man legally incapable of committing a crime, the District Court allowed the "crucial to the government and impacting on the defense" hearsay statements of the mentally-deranged Exum to come before the jury to be used against **Buttram** if the jury found some sort of "principal-agent" relationship between **Exum** and **Buttram**. No insturctions were offered as to what the jury should do with, say, the contents of the October 1st and October 4th, 1975, hearsay telephone calls should the jury find no such **Exum-Buttram** agent-principal relationship on those October 1st and October 4th, 1975 telephone calls made

solely by **Exum** and not participated in by Buttram. In fact, this becomes a key issue in the case, for the jury acquitted **Buttram** of the Exum-made October 1st and October 4th, 1975 telephone calls, but after many hours of deliberation, the jury convicted Buttram of the October 8, 1975, phone call, although because the Court failed to provide separate jury verdict forms, it can not today be ascertained just why. In short, was it because of the now-clearly inadmissible October 1, and October 4th calls, without limiting instructions; or was it because of the hearsay October 8, 1975 call initially made by Baldwin to **Exum** where Buttram briefly talked to Baldwin about, **inter alia**, a shampoo for Baldwin's dog hit by a McKean, Pennsylvania resident **skunk**, some valuable paintings in the Buttram home in Oklahoma and culminated in Buttram talking to Baldwin about coming to San Diego to witness a test of the machine before he invested?

(f)

ARGUMENT

I.

THE TRIAL COURT COMMITTED ERROR IN ALLOWING INTO EVIDENCE, OVER DEFENSE OBJECTION UNDER NO KNOWN EXCEPTION TO

THE HEARSAY RULE, THE "CRITICAL TO THE GOVERNMENT AND IMPACTING ON THE DEFENDANT BUTTRAM" HEARSAY STATEMENTS OF FRANK KINNEY EXUM PROPOUNDED BY PROSECUTION WITNESSES J. ROBERT BALDWIN, JOHN PAUL BOKAL AND BARBARA SMITH, WHERE NO LIMITING INSTRUCTIONS WERE GIVEN TO THE JURY TO DISREGARD THEIR EFFECT ON THE OCTOBER 8, 1975 TELEPHONE CALL PARTICIPATED IN BY BUTTRAM, AND WHERE BY THE JURY'S VERDICT OF ACQUITTAL ON COUNT I AND COUNT II (THE TELEPHONE CALLS OF OCTOBER 1 AND OCTOBER 4, 1975) THE JURY FOUND AS A MATTER OF FACT THAT BUTTRAM WAS NOT THE PRINCIPAL OF EXUM AS AN AGENT, THAT BUTTRAM HAD NOT AUTHORIZED EXUM'S ACTS, AND THAT EXUM WAS NOT THE "TOOL" OF BUTTRAM. BUTTRAM'S 6TH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE FRANK KINNEY EXUM WAS ABROGATED. **POINTER V. TEXAS**, 380 U. S. 400; **DUTTON V. EVANS**, 400 U. S. 74.

The trial record indicates that Frank Kinney Exum was determined to be mentally deranged and not legally responsible for his acts in making the phone calls of October 1, October 4, and October 8, 1975 to J.

Robert Baldwin in Erie, PA. Hence, it is clear that no sort of legal "conspiracy" could exist between **EXUM** and **BUTTRAM**, for if **EXUM** can not legally participate in a "conspiracy", then can neither **Buttram**. The Court realized this but allowed the calls of October 1, October 4, and October 8, 1975, made by Exum to be testified to concerning Exum's statements on the theory that **Exum** was the "agent" of Buttram, or was "authorized" by Buttram, or was the "tool" of Buttram because Buttram had been the source of giving Governments Exhibits 1, 2, 3, 4, and 5 to **Exum** during the late September, 1975 airplane trip taken by Barbara Smith, Exum, and Buttram to Kentucky, Tennessee and Alabama and return.

By the jury's verdict of acquittal, the jury determined that no such "agency", "authorization", or "tool" arrangement existed. We know of no exception to the hearsay rule and 6th Amendment right of confrontation that would allow these "crucial to the government's case and impacting on the defense" per **Dutton v. Evans**, 400 U. S. 74, **United States v. Adams**, 446 F. 2d 681 (9th Cir. 1972) and **United States v. Arias**, 388 F. Supp. 736 (C. D. Calif. 1975) statements of Exum before the jury.

It must be observed that:

1. The government's case clearly depended upon

getting the Exum statements before the jury in order to convitct Buttram, for without the Exum statements, what Buttram said concerning any ''fraudulent'' representations were meaningless, **de minimus**, and not related to the merits of alledgedly attempting to convince Baldwin to invest in the ''gold making'' machine. We note that the bulk of the Buttram-Baldwin conversation dealt with the so-called ''skunk hitting dog'' incident, the paintings, and a few peripheral comments on Baldwin coming out to witness a test. Clearly without the inadmissible-under-any theory Exum statements, the government's efforts to convict Buttram would have ended on the twin shoals of frustration and impossibility.

2. Clearly, the statements were illegally admitted under any theory of the rules of evidence.

3. Clearly the error constituted a denial of 6th Amendment rights of confrontation of Frank Kinney Exum, **Pointer v. Texas**, 380 U. S. 400, which can hardly be said to be **harmless error** per **Harrington v. California**, 395 U. S. 250, **Fahy v. Connecticut**, 375 U. S. 85, or **Chapman v. California**, 386 U. S. 18, 24.

4. Clearly, no limiting instruction to disregard the Exum statements if the jury found no agency-principal relationship between Exum and Buttram was proffered, and authority is ample to convince that it would have

been non-efficacious even if given. See **United States v. Bruton**, 391 U. S. 123; **Roberts v. Russell**, 392 U. S. 293, **People v. Aranda**, 63 C. 2d 518; **People v. Charles**, 66 C. 2d 330; **People v. Massic and Vetter**, 66 C. 2d 899; **United States v. Brown**, 490 F. 2d .....(D. C. Cir. 197), especially noting all of the cases cited in the latter opinion.

5. Thus, it is clear that the jury actually used, or could have used, the entire Exum statements to give meaning to the otherwise nonsensical, **de minimis** role played by Buttram in Buttram's brief phone conversation with Baldwin, for by the jury's determination of no agency-authorization or ''tool'' arrangement between Buttram and Exum, they could only convict Buttram for Buttram's slight **personal** telephonic contact. Clearly, the jury could not logically have found some principal-agency relationship suddenly springing up on the date of October 8, 1975 if they did not find it being created from the late September inception of Buttram giving the Government's Exhibits 1, 2, 3, 4, and 5 to Exum with a tacit, implied, or overt instruction that Exum seek and obtain investors for the E-H apparatus. This factual finding of no agency or authorization, or ''tool'' arrangement foreclosed the government any longer contending that such a relationship existed between Exum and Buttram. **Ashe v. Swenson**, 397 U.

S. 436 and the reasoning contained therein.

6. Clearly, a reviewing Court cannot set with the prescience or prognaticative ability to ascertain just what obnoxious and deleterious effect the Exum statements had on the lay jury. We need go no further than observe that Buttram and Exum **both** were from the South and spoke with Southern accents; hence, it is clear that Baldwin could have failed to recall which man, Exum or Buttram said what, and moreover it is clear that items allegedly said in the October 8, 1975 conversation by Buttram could have been said in the earlier minutes by Exum, or indeed, could have been said on an earlier day, to wit, on the October 1, or October 4, 1975 conversations by Exum.

The import of this is a right of cross-examination and confrontation of Exum by Buttram that could clearly and potentially clarify the obvious ambiguity. It could have allowed Buttram to have questioned Frank Exum about all of the things Baldwin said was said by Buttram when in reality **Exum** said them. It must be remembered that expert medical evidence indicated that Exum was loquacious and given to the use of exaggerated, tremendously huge numbers such as $200,000,000 per day, assets of $500,000,000 being ascribed by Exum as being the net worth of Buttram, etc. Clearly the undisputed Exum statement of

Buttram's net worth being $500 million lends credence to a contention that, as well, Exum stated that the net income of all wells could be $200 million per day. Surely it sounds like the weird sort of numbers that Exum would use rather than the rather conservative Buttram who saved even receipts from a few dollar luncheon entertainment at a McDonald's hamburger stand.

In short, the denial of confrontation of Exum infected this case with prejudicial error where it is now clear that none of the statements of the mentally-deranged Exum should have come before the jury and where no limiting instructions were given to the jury to disregard the statements made by **Exum** as against Buttram if they found no **agency**, no **authorization**, or no use of **Exum** as the "tool" of Buttram.

Ample Federal Authority suggests that even if **hearsay** statements legitimately come in under a "recognized exception" to the hearsay rule, they may violate the 6th Amendment confrontation clause of the U. S. Constitution if they are "crucial to the Government's case and impacting on the Defense". **Dutton v. Evans**, 400 U. S. 74; **United States v. Adams**, 446 F. 2d 681 (9th Cir. 1972); **United States v. Arias**, 388 F. Supp. 736 (C. D. Calif. 1975). It is manifest that the error is all the more tragic, compound, manifold and impacting if, as here, they are erroneously

admitted **ab initio**. Clearly no recognized means can place the **Exum** statements before the jury and they were clearly "crucial to the government's case and impacting on the defense". No other real significant evidence suggested that Buttram sought to defraud J. Robert Baldwin by interstate telephone conversation.

Indeed, as we develop in a separate argument, the evidence from a multiplicity of views suggested Buttram's lack of knowledge that there was any defect in the analysis set forth in Government Exhibits 1, 2, 3, 4, and 5. As we detail elsewhere, this includes but is not limited to:

(a.) Dr. Richard Wesley's admission that Government Exhibit 1 had "Remarks: Assay Ton" on it and that Wesley wrote "1 milligram equals 1 ounce" on the face of Government Exhibit 1; **Buttram** did not know the significance of either of these notations and hence telephoned Dr. Richard Wesley at Wesley's Houston home to make inquiry. Wesley explained the meaning and Buttram verified this from Peale's "Mining Engineers Handbook". Following this, Buttram made projected calculations based on an anticipated 60,000 gallons per day of water being processed by the E-H precipitator and the current prices for sale of gold and silver;

(b.) Buttram placed over a year and a half of

totally unsalaried, uncompensated time on the project; he borrowed $160,000.00 on a personal painting, and placed over $90,000 of personal funds into the project;

(c) Buttram so believed in the potential of the Silver State Lab Analysis on the Jack Maisson Well that when he learned that said well was "capped", he spent some $14,000 in drilling a parallel well beside it;

(d) Buttram specified at all times that no money was to be accepted into the project from any investor until and unless that investor had seen a test and had become satisfied with the results thereof. This was testified to by J. Robert Baldwin, John Paul Bokal, Barbara Smith, Dr. Richard Wesley and Buttram himself, and was never controverted by any other witness whatsoever.

Hence, in view of all of the foregoing rather compelling, circumstantially persuasive evidence, we suggest that the use of the Exum hearsay via Baldwin, Bokal and Smith, coupled with the **de minimis** participtionof Buttram in a minor role, on the October 8, 1975 phone conversation, so infected this conviction with 6th Amendment denial of confrontation error and the conviction must be set aside and a new trial granted.

II.

THE EVIDENCE ADDUCED AT TRIAL DID NOT SUPPORT THE GUILT CONVICTION OF DEFENDANT MYRON BUTTRAM; THE CONVINCING CIRCUMSTANTIAL EVIDENCE SHOWED THAT BUTTRAM WAS NOT AWARE OF THE DEFECTS SET FORTH ON GOVERNMENT EXHIBIT 1; THE CONVICTION ON COUNT III MUST BE EVALUATED BY THE CRITERIA OF **IN RE WINSHIP**, 397 U. S. 358, 364.

We perceive that a severe issue arises in the case at bar, especially when the inadmissible hearsay statements of **Frank Kinney Exum** are deleted, whether the evidence adduced supports, beyond a reasonable doubt that Buttram used interstate telephone wires with the required **intent to defraud** under 18 U. S. C. 1343 or 18 U. S. C. 2. **In Re Winship,** 397 U. S. 358, 364.

Compelling circumstantial evidence indicates that Buttram knew nothing about the critical factor of error of some 30,000 to 1 that ''threw off'' the projected recoveries from the wells of the Imperial Valley. (Government Exhibits 1, 2, 3, 4 and 5).

Inter alia, these are the following:

1. (a.) Buttram received the original of Government Exhibit 1 from Dr. Richard Wesley by mail circa November or December, 1974. Contained thereon were

the typed statements ''Remarks: Assay Ton'', typed by the typewriter owned by **Julius Bonocchi** of the Silver State Testing Labs of Las Vegas, Nevada.

(b.) Likewise contained on Government Exhibit 1 was the penned equation ''1 milligram equals 1 ounce'' in the handwriting of Dr. Richard Wesley, a scientifically trained geologist.

(c). When **Buttram** received this, he telephoned Wesley and asked him what each of the above two relatively esoteric remarks meant; Wesley both explained the concept to Buttram and also referred him to a Mining Engineers Handbook by **Peale.**

(d.) Having the concept explained to him and based on Wesley's concept of 60,000 gallons of water per day being processed by the device, **Buttram** made the calculations appearing of record on Government Exhibits 1-5 showing a prognostication of $283,000 per day on recoveries.

While **Albert Einstein** could realistically be charged with gross errors in calculations on the subject of **relativity and theoretical physics,** it is not at all readily perceivable why a layman such as **Buttram** can be chargeable with knowing or realizing an error of 30,000 to 1 where he had made efforts to ascertain what the concept meant.

2. (a.) At least five (5) witnesses testified under

oath that no money was to pass from the investor to the principals Buttram and Wesley **unless** and **until** the prospective investor had viewed a test, seen an assay done, and **had been satisfied with the results**, and had become satisfied with the overall concept. It is difficult to envision how this squares with a scheme and artifact to defraud; further, it hardly appears consistent with someone who **knows** that the process is fraudulent and will not bear out mathematically, geologically, and scientifically. In other words, only someone who really believed that the process was sound would seek investors under a canopy of telling them that no investment money was desired or expected unless and until that investor was satisfied with an assay ran by a recognized assayer. Surely a scheme that was off by 30,000 to 1 in productivity would be discovered by the assayer and the prospective investor would depart without advancing one dime.

We must therefore conclude, and we do therefore logically argue, that Buttram was not aware of the discrepancy in the assay which led him into the $283,000 per day calculation prediction. For if he was, he would not predicate any prospective investors' money being advanced upon that investor first being satisfied with an assay that had no scientific possibility of working.

The Court is reminded that:

(a.) J. Robert Baldwin clearly stated that he was to advance **no money at all** unless and until he was satisfied with the results of an assay and was happy with the overall process and procedure. (See R. T. A. 38, lines 10-19 and R. T. A. 71, R. T. A. 76, lines 3-16; R. T. A. 80, lines 15-23; R. T. A. 81, lines 1-10; R. T. A. 80-81 in toto; R. T. A. 89; R. T. A. 96, lines 13-24; R. T. A. 97, lines 22-25; R. T. A. 98, line 1 - R. T. A. 99, line 15).

(b.) **John Paul Bokal** of the Federal Bureau of Investigation testified that no money was to pass hands until and unless they, as agents of J. Robert Baldwin, were fully satisfied. (See R. T. A. 155, line 20- R. T. A. 156, line 23; R. T. A. 158, lines 1-9; R. T. A. 166 in toto; R. T. A. 171-172; R. T. A. 186, lines 1-8 and 186 in toto).

(c.) Barbara Smith was called as a government witness and testified that no money was to pass from an investor to the project unless and until that investor was satisfied. (See R. T. A. 222, lines 1-5) R. T. A. 241; R. T. A. 245, lines 3-25; R. T. A. 246, line 1; R. T. A. 247, lines 19-25; R. T. A. 248, line 1; R. T. A. lines 7-10; R. T. A. 257, lines 11-16, R. T. A. 264).

(d.) Richard Wesley, Ph.D., a consulting geologist and inventor of the E-H precipitator, testified

that no money was to be passed to him and Buttram unless the investor was satisfied with the results of assays and the entire process. (See R. T. A. 1052-1053.)

(e.) Defendant Myron Buttram affirmed the escrow arrangements. (R. T. A. 1199-1200; 1204-1205).

3. As late as October, 1975, following his arrest, Buttram and Wesley tried to convince Buttram's Attorney, Roger S. Hanson, Ph.D. in engineering and a Member of the California Bar, that the E-H Precipitator was technically sound and could produce results predicted by the collective Exhibits of Government 1-5; Attorney Hanson analyzed the calculations and concluded that the analysis was off by a 30,000 to 1 augmentation, yet defendant Buttram did not believe it and brought Dr. Richard Wesley from Houston to talk to Dr. Hanson in his Santa Ana, California law office. In spite of that conference, Buttram so believed in the accuracy of the project that he:

4. Personally borrowed $160,000 on the Velasquez painting and gave $90,000 in personal cash to the project. It is mystifying that Buttram would place $90,000 cash into the project had he known that it was scientifically unsound because of the error in the Silver State Lab Assay (Government Exhibit 1).

6. **Buttram** and **Wesley** committed over a year of their personal time to the project with its concomitant

requisite effort. It hardly bespeaks of logic to say that this would have been done had they possessed any inkling that something was wrong with the assay.

Thus, we suggest that the evidence clearly suggests that the required fraudulent intent was **not** demonstrated by the Government as a matter of law, and this case **must** be reevaluated and evaluated **de novo** with the inadmissible hearsay removed from the case presented through J. Robert Baldwin, John Bokal, and Barbara Smith. **See In Re Winship**, 397 U. S. 358, 364.

In Re Winship, 397 U. S. 358, 364, 25 L. Ed. 2d 368, 375 provides:

"Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.''

In short, we believe that the foregoing analysis convinces that the highly prejudicial ''crucial to the government and impacting on the defense'' hearsay adduced concerning Counts I and II requires reversal and the grant of a new trial for failure to accord 6th Amendment confrontation of the key witness **Frank Kinney Exum**; that evidence stands in contradistinction to the convincing circumstantial evidence that Myron Buttram did not have the intent to defraud.

A new trial should be accorded and this single count conviction reversed.

III.

AS A MATTER OF LAW, THE INTENT TO DEFRAUD BY INTERSTATE TELEPHONE DID NOT EXIST, FOR EACH AND EVERY WITNESS PRESENTED IN THIS CASE TESTIFIED THAT J. ROBERT BALDWIN WAS NOT TO INVEST ANY MONEY UNLESS AND UNTIL HE OR HIS REPRESENTATIVES HAD WITNESSED A TEST OF THE ELECTROHYDRAULIC PRECIPITATOR, AND WERE FULLY SATISFIED WITH THE RESULTS OBTAINED; IN VIEW OF THIS UNCHALLENGED EVIDENCE, THE REQUISITE INTENT TO DEFRAUD DOES NOT EXIST AS A MATTER OF LAW.

The government's chief witness, J. Robert Baldwin, testified that Mr. Exum told him that the $175,000.00 was to be placed in escrow, and released only when he was ''absolutely satisfied over the results.''

At R.T.A. 38, lines 10-19, Baldwin said:

> A: Well, he said that he was an attorney in Alabama and that if I would send the money to him that he would hold the money in escrow and it would be perfectly safe because he was an attorney and that when I was absolutely satisfied that the machine was producing the gold and that I would be because if I went to San Diego they would put on a demonstration right at the well and that there would be an assayer there that would assay the gold and at that point then I would release the money and have the quarter interest in the well.

At R.T.A. 71, lines 3-17, Baldwin said:

Q: All right now as I understand your direct testimony a little bit ago Mr. Exum or Evans told you that the $175,000.00 was to be placed in that escrow account?

A: Well, he wanted at first me to send him the $175,000.00 to put in escrow prior to my coming to Dallas and subsequently to San Diego and so forth. Of course, I never agreed to do that.

Q: Why did he say he wanted you to give him the $175,000.00 to place in escrow prior to coming to Dallas?

A: Well, he was a friend of mine and he was going to protect my interest, he was acting as my attorney and he was going to protect my interest, he was to be my escrow agent.

Q: All right, now did he say the money was not to be released until you were satisfied after you had seen the tests?

A: At one point he said that, yes.

At R.T.A. 72, lines 12-17, Baldwin said:

Q: All right, but the representation to you was at least only if you were satisfied would the money be released and if you were not satisfied the money was to go back to you?

A: That is what he told me.

Q: That is what he told you?

A: Yes.

And at R.T.A. 73, lines 15-22, Baldwin testified concerning the escrow:

Q: All right, now did Exum state that the money would be put in escrow until you, Baldwin, had personally inspected and been satisfied with the wells and progress in question, did he tell you that?

A: He said if I put the money in escrow with him that he would assure me that he would handle the money for me and that I would be satisfied, that if things weren't as he had stated that the money would be returned.

Clearly, no money was to pass unless and until Baldwin's representatives were satisfied; at R.T.A. 76, lines 3-16, Baldwin said:

Q: And was there discussion at that time between you and Mr. Evans that the checks would only be released if your representatives were satisfied with the progress down there?

A: They would be released if we were satisfied, that is correct.

Q: All right.

A: Mr. Bokal was satisfied.

Q: All right, so the ultimate agreement again that existed between you and Mr. Evans was, one, that your representative Mr. Bokal and Mr. Boutwell would have

to be satisfied with what they saw scientifically before any money was to pass from their control?

A: That is correct.

At R.T.A. 80, lines 15 — R.T.A. 81, line 21, Baldwin admitted the following:

Q: All right, now in your previous discussions before you called and said that you couldn't come and you were going to send Boutwell and Bokal had you been invited by Mr. Exum to come down and personally witness the test?

A: Yes.

Q: All right, and that was pursuant to the representation that you were to not release any money until you were satisfied with the results of the test?

A: That is correct.

Q: And they also offered to have an assayer present to do some studies on the results of the tests?

A: And they said they would have an assayer right there who would determine that the fallout of the water would be gold.

Q: All right, and only if that assayer came up with positive results that satisfied you would you then be investing in the machine is that right?

A: That is the point at which he was talking about Mr. Exum holding the money, that was to be the point at which if he were holding the money that he would

release it.

Q: If you were satisfied?

A: Yes.

At R.T.A. 89, Mr. Baldwin said at lines 5-18:

Q: All right, and it was then your understanding that if and only if the machine was to be proven successful was the money to be released?

A: Well, I couldn't have that assumption because the money was not mine.

Q: All right, this was just a ruse on your part, then?

A: This was as I was instructed.

Q: All right, so it was never in your mind that the money was going to be released no matter what happened?

A: Well, it wasn't my money.

Q: All right, but nonetheless your understanding with Mr. Exum as conveyed by Mr. Exum to you was that only if he was able to show your representatives the feasibility of this device then would he be expected to receive money?

A: That is correct.

Baldwin admitted under oath that appellant Buttram had told him that no money was expected to pass hands unless Baldwin was satisfied with the results of the tests; at R.T.A. 96, lines 11-24, the

following testimony of Baldwin, taken under oath, appears:

Q: All right, then eventually Mr. Buttram personally invited you to come to San Diego to witness the test?

A: Yes, my discussions with Mr. Buttram were generally to confirm the elements of the proposal made by Mr. Evans.

Q: And it is true, is it not, that Buttram said that there would be a personal demonstration given to Mr. Boutwell and Mr. Bokal in San Diego as your representatives?

A: Yes.

Q: And that you had to be satisfied with the results of the tests before any money would be turned over?

A: Yes.

Q: And as far as they were concerned if you were not satisfied why you didn't have to lend any money, isn't that correct?

A: That is correct.

And at page 97, line 22 through page 98, line 1, the following occurred:

Q: All right, there is just no question in your mind that Mr. Buttram told you that your representatives had to be satisfied with the result of the tests before you

were to put any money into the venture, is that correct?

A: That is correct.

And finally at R.T.A. 99, lines 10-15, Baldwin admitted under oath:

Q: All right, so they were going to subject the whole process as far as you know to an independent laboratory scrutiny?

A: That is correct.

Q: All right, and only after that test proved successful were you then to consider investment, right?

A: I think that was agreed.

John Paul Bokal of the F.B.I. who had posed as a representative of J. Robert Baldwin, testified under oath as follows:

At R.T.A. 155, line 20 — R.T.A. 156, line 23, F.B.I. agent Bokal said:

Q: And it is a fact, is it not, that he was supposed to be satisfied with what he saw down in Texas or California before he was to invest, isn't that correct?

A: He was supposed to bring the money and put it in an escrow account. Mr. Exum indicated he was an attorney, a member of the Bar of the State of Alabama. He would act as Mr. Baldwin's attorney, he would place the money in an escrow account immediately upon Mr. Baldwin being satisfied with the demonstration. Exum would then take it out of the escrow account and put it

into the investment.

Q: All right, so there is no question that the input of the conversation was to be that there was to be no money passing hands out of the escrow situation until Mr. Baldwin was satisfied that it was a workable apparatus, is that right?

A: It was to go into the escrow account of which Mr. Exum would have control.

Q: Well, did Mr. Exum say that he would have control or did he imply that it would be set up in a bank?

A: It would be put up in an escrow account for Mr. Baldwin with Exum having the power to get it out and invest it, that is my understanding, sir.

Q: All right, but that would be at some banking institution, isn't that correct, it would be in the escrow account in the bank?

A: They just said escrow account.

Q: And then Mr. Exum would not pass out that money until Mr. Baldwin was satisfied?

A: That is what he said, sir.

And at R.T.A. 158, lines 1-9, the following appears:

A: Yes, sir, he told me that that was a last minute deal, we were going to go and he couldn't go because the bank examiners were in and he told me under the circumstances that we had the full power to conclude

the deal.

Q: All right, and it was your understanding then that only if you and Mr. Boutwell were satisfied with the tests did Mr. Exum expect to receive some money that you would bring, is that correct?

A: Yes, sir.

At R.T.A. 171, lines 17-22, the following appears concerning appellant's desire that Baldwin's representatives see the device's results before transferring any money:

Q: All right, there is no question in your mind that Buttram wanted you and Mr. Boutwell to come to San Diego to see this test before anything was going to be done in the way of transferring any money?

A: He represented to us he wanted us to see the tests, yes, sir.

In finality, at R.T.A. 186, lines 1-17, F.B.I. agent Bokal said:

BY MR. HANSON:

Q: Of course, that is only after it proved to work to your satisfaction?

A: Well, it did work and it would be sold after we had seen a demonstration.

Q: To your satisfaction, right?

A: Until we agreed to it, yes sir.

MR. HANSON: All right.

BY MR. WEST:

Q: What was the agreement if they satisfied the agreement at the demonstration you would give them the money, right?

A: Yes, sir.

THE COURT: All right, you are excused, sir. Is this witness free to leave?

(WITNESS EXCUSED)

Government witness Barbara Smith testified as follows:

At R.T.A. 221, line 18 — R.T.A. 222, line 5, Smith said:

Q: Now, did you become aware that representatives of Mr. Baldwin were to come to Dallas?

A: Yes, I did.

Q: And how did you become aware of that?

A: He told me that Mr. Baldwin was going to send two representatives to Dallas. They were going to bring $175,000.00 and they were going to place this money in escrow. We were going to California to see a test run on this process and he explained to me that if they were satisfied and interested in investing then the money would be turned over to us. If they did not like it, if they were not interested in investing they could take their money and go home.

At R.T.A. 241, lines 9-14, Barbara Smith said:

Q: All right, now during the time that you had discussions with Exum about possibly securing somebody to invest in the project is it a fact or is it not a fact that Mr. Exum always discussed escrowing money until the potential investor would be satisfied with the results of the tests?

A: That is absolutely correct.

At R.T.A. 245, line 3 — R.T.A. 246, line 5, Smith said:

Q: That is the first time you ever heard of him, all right, and what was discussed on that call?

A: Mr. Exum took a copy of the projection on the 800-foot well and he read this information off to Mr. Baldwin, told Mr. Baldwin if he was interested that he could escrow $175,000.00. We would go to California and take a look at the process. If he liked it and was satisfied then they could do business. If he did not like it, if he was not satisfied he could take his $175,000.00 and go back home.

Q: All right, now, there is no question in your mind as far as Exum was talking to Baldwin that there was always the discussion between Baldwin and Exum that money, if any, was to be escrowed and was to be turned over or invested if and only if Baldwin was satisfied, is that correct?

A: That is correct.

Q: All right, was there ever inducement on the part of Mr. Exum in your presence to have money come to Exum in any other way except here in escrow?

A: No, sir.

Q: All right, was this escrow to be set up at a bank?

A: Yes, it was.

Q: All right, and did Mr. Exum always discuss putting the escrow into a mutual banking institution?

A: Yes.

Q: All right, have you ever heard Exum was an attorney?

A: Yes, I have.

Q: And did he personally tell you this?

A: Yes, he did.

At R.T.A. 247, line 19 — R.T.A. 248, line 1, the following occurred:

BY MR. HANSON:

Q: I think we were talking about you being present when Mr. Exum was calling Mr. Baldwin in Pennsylvania, is that correct?

A: Yes.

Q: And I would ask you whether Mr. Exum had told Mr. Baldwin that the money was to be escrowed in a bank and only turned over if you were satisfied, is that correct?

A: That is right.

And at R.T.A. 257, lines 3-16, the following occurred:

Q: All right, did you ever have any discussion about Mr. Buttram as to Mr. Buttram's understanding with Mr. Exum about any monies being placed in escrow that might be collected from any prospective investor?

A: My understanding was that the money was to be placed in escrow and left there until the people were either satisfied or dissatisfied and had seen the process and had a chance to make up their minds.

Q: In your presence did Buttram ever try to collect any money from anybody, any other auspices?

A: No, he did not.

Q: In your presence did Buttram ever try to collect any money from Boutwell and Bokal?

A: No, he did not.

And in finality, Barbara Smith, a witness called by the government, testified at R.T.A. 264, lines 7-18:

Q: All right, now just in summary am I correct in saying that your understanding of any money that was ever to be paid into this process by any prospective investors, that was to be escrowed subject to the investor being totally satisfied with the results of the process before any money was to be utilized by either

Exum or Buttram in the process, your answer is what?

A: That is right.

Q: You don't know anything to the contrary?

A: No, I do not.

MR. HANSON:

All right, thank you, no additional questions.

Dr. Richard Wesley, the inventor of the machine, testified as follows at R.T.A. 1053, lines 9-16:

Q: All right, had you any conversation with Buttram about the desirability of escrowing money from potential investors to see who was serious?

A: It was discussed, yes.

Q: All right, and was it your understanding that you were not going to take any money from any of these people until you could show them tests that would perform well?

A: That is right.

While it is admittedly self-serving, appellant Buttram testified under oath as follows; at R.T.A. 1200, lines 3-7, appellant said:

Q: And did you have any discussion with him about where the money was to be placed if he was ever successful?

A: It was to be escrowed. We were to have a test and then locate a situation where it would be suitable

and mutually satisfactory to all parties where to put the unit.

And at R.T.A. 1204, line 18 — R.T.A. 1205, line 5, Buttram said:

Q: All right, now was it your understanding that this precipitator that Exum was going to try and sell to whoever the gentleman was would be operated on the Jack Maisson well or some other well?

A: No, sir, we were to find a location where to put it mutually satisfactory.

Q: Did you indicate to Exum that it was your intent that if and only if the prospective buyer was satisfied with the thing after seeing the tests that then he would come in?

A: This was the way I put it.

Q: The money was to be escrowed until the prospective buyer was satisfied?

A: That is correct.

Thus, the uncontradicted evidence presented by three government witnesses:

(1) J. Robert Baldwin (the alleged victim of the "scheme to defraud");

(2) John Paul Bokal of the Federal Bureau of Investigation (who posed as the representative of Baldwin, and

(3) Barbara Smith; and by two defense witnesses;

(4) Dr. Richard Wesley, the inventor of the machine, and

(5) Myron Buttram the appellant herein, was that no money was to be given up by either potential investor Baldwin or his agents, Bokal and Boutwell, unless and until they were fully satisfied with the capabilities of the machine.

We suggest therefore, that, as a matter of law there can be no scheme or artifice to defraud by interstate telephone wire.

This conviction of a single count of "wire fraud" should therefore be reversed.

Clearly, not only was there to be no money passing until the investor was satisfied, but **in fact** no monetary loss was here suffered.

Other Federal Circuits hold that in either mail or telephone fraud cases, some person must have been defrauded, and thus a clear conflict of authority exists between the 3rd and 2d and 6th Circuits.

In **United States v. Baren**, 305 F. 2d 527, 528 (2d Cir. 1962), the Second Circuit said:

> ". . . In every mail fraud case, there must be a scheme to defraud, representations known by defendants to be false **and some person or persons must have been defrauded. . .**

In **United States v. Rabinowitz**, 327 F. 2d 62, 76,

(6th Cir. 1964) the 6th Circuit said exactly the same thing.

We perceive no realistic difference between use of the **mails**, as in **Baren, supra**, and **Rabinowitz, supra**, from the 2d and 6th Circuits, and, as here, the use of the **telephone**, and thus the 3rd Circuit sanctions a conviction where **no one** was, even remotely defrauded

In view of this clear conflict in the Circuits, and in view of the even more persuasive uncontroverted facts that no money was to pass until the prospective investor was satisfied, establishing as a matter of law and as a matter of fact that no fraudulent scheme existed, this Honorable Court should grant Certiorari.

CONCLUSIONS

Because of the conflict of authority in the Circuits, and because of the unique constitutional issues existing in this case, involving as well the Supervisory role of this Honorable Court over the lower Federal Court system this Honorable Court should grant Certiorari.

Respectfully submitted,

ROGER S. HANSON
Attorney for Petitioner
Member of the Bar
U. S. Supreme Court

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
V. (Criminal)
MYRON BUTTRAM (No. 76-30 Erie)
(Dated: June 1, 1977.)

MEMORANDUM DENYING
DEFENDANT'S MOTION FOR NEW TRIAL

The defendant in this case, Myron Buttram, was convicted of one count of wire fraud in violation of 18 USC 1343 and 2 on September 25, 1976, at the conclusion of an eleven day jury trial. Buttram was acquitted of two other counts of wire fraud.

The indictment charged both Frank Exum and Myron Buttram with three counts of wire fraud. However, on September 14, 1976, the court granted an oral motion of Assistant United States Attorney James West dismissing all charges against Exum.

Exum had been sent to the Federal Psychiatric Center in Springfield, Missouri, pursuant to an order of Judge Luther B. Eubanks of the Western District of Oklahoma before whom Exum faced other federal charges unrelated to this case. Initially, on June 17, 1976, a report from Jack Eardly, M.D. Chief of Psychiatry at the Springfield facility adjudged Exum competent to stand trial. However, the Springfield staff

changed their mind and in a letter dated August 9, 1976, from Eardly to Judge Eubanks found Exum to have been legally insane during the period he allegedly committed federal crimes in Oklahoma. This letter stated in part:

> "Although at that time (June 17, 1976) we expressed an opinion that he could have been responsible, lacking information to the contrary, it is our considered opinion that in all likelihood, and using the criterion of reasonable medical certainty, he would have to be considered to have been suffering from a mental disease that would have incapacitated him to the extent that he lacked substantial capacity to appreciate the wrongfulness of his act or could not conform his conduct to the requirements of the law, considering patient's age and the apparent chronicity of his illness."

It was in reliance on this second letter of August 9, 1976, that Judge Eubanks agreed to dismiss all charges pending against Exum in Oklahoma. On September 14, 1976, this court also granted the government's motion to dismiss charges pending against Exum in this district.

The testimony at trial disclosed that an Erie businessman, J. Robert Baldwin, received a phone call from Frank Exum on October 1, 1975, inquiring about whether Baldwin was interested in investing money in a machine that extracted gold from thermal well waters

in California. (Tr. 34). For an investment of $175,000, Mr. Baldwin was offered a one-fourth interest in such a machine. (Tr. 35) Exum represented that a well currently in operation in the Imperial Valley of California was producing over one million dollars a day in gold and $177,000 worth of silver and other metals.

Suspicious of possible fraud, Baldwin contacted the local office of the FBI and informed them of the call. Special Agent John Bokal came to Baldwin's office the following day, October 2, 1975 and a call was placed to Exum. The terms of the original offer were reconfirmed and Exum requested that Baldwin come to San Diego to view the machine.

These two phone calls constituted the basis for the first two counts of the indictment of which Buttram was ultimately acquitted. A third phone call occurred on October 8, 1975, at which time Baldwin spoke to both Exum and Buttram. This phone call constitutes the basis for Buttram's conviction of one count of wire fraud and will be discussed in detail in the next section of this memorandum, infra.

The court ruled at the time of trial that Baldwin could testify to Exum's phone calls of October 1 and 2, 1975 pursuant to Rule 801(d) (2) and (D) of the Federal Rules of Evidence since the government's evidence established that Exum was an agent or tool of Buttram used in devising a scheme and artifice to defraud Baldwin. This ruling was made after extensive argument at trial and the matter has been extensively

reargued in counsel's briefs and oral argument concerning Buttram's motion for a new trial filed on October 4, 1976.

Defense counsel describes the court's alleged error in introducing this testimony as "the major issue on review of this conviction". Most of the remaining extensive arguments before this court by the defendant in support of a new trial concern the alleged insufficiency of the evidence to support a conviction on the third count of wire fraud. In a third miscellaneous category fall several attacks by the defendant on other rulings made by the court throughout the eleven day trial.

After considerable reflection about this complicated case, the court has decided to reaffirm its previous rulings on all legal issues and to uphold the jury's verdict as to Count 3 as being supported by sufficient evidence to sustain conviction beyond a reasonable doubt. Accordingly, the defendant's motion for new trial has been denied.

(1) Admission Into Evidence of Testimony Concerning Out of Court Declarations of Frank Exum.

To be properly admissible against Myron Buttram, the out of court statements made in the October 1 and 2, 1975, phone calls by Exum to Baldwin must meet the requirements of two separate tests: they must fall within one of the exceptions to the hearsay rule and they must not violate Buttram's sixth amendment right to confront witnesses.

In the case of California v. Green, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930 (1970), the Supreme Court made it clear that the hearsay rules and the confrontation clause pose separate problems in a criminal case although there is a great deal of overlap:

> "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence."

With regard to the hearsay problem, two theories were propounded by the government at trial to justify admission of the Exum phone calls: the co-conspirator exception to the hearsay rule and the hearsay exception for admissions by an agent.

Defense counsel argued at trial that the conspiracy exception could not apply because Buttram could not have conspired with the legally insane Exum. Even though the court did not discover any cases holding that it is legally impossible to conspire to commit a crime with an insane person, the court did not reach this question at the time of trial and based its ruling instead on the agency exception to the hearsay rule.

The admission by an agent exception to the hearsay rule is codified in Rule 801(d)(2)(C) and (D) of

the Federal Rules of Evidence:

> "(d) Statements which are not hearsay. A statement is not hearsay if—
>
> * * *
>
> (2) Admission by party opponent. The statement is offered against a party and is
>
> * * *
>
> (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

Defense counsel argues that this exception does not apply to an insane or mentally irresponsible agent. It appears to the court, however, that Exum's insanity is irrelevant to the operation of this hearsay exception and the only issue is whether or not the evidence at trial supported the existence of an agency-principal relationship between Exum and Buttram. Otherwise, Exum's insanity would serve to insulate Buttram from the consequences of criminal actions performed by his authorized agent. It would seem to follow from the defendant's argument that one could train a mechanical robot, a wild animal, or a mentally retarded human to kill and be immune from criminal prosecution.

The court would also note that legal liability for the actions of irresponsible agents appears to be contemplated under 18 USC 2 on which the jury was instructed in the court's charge.

> "2. Principals.—(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

The court in United States v. Grasso 356 FS 814 (E.D.Pa. 1973) made the following comments about 18 USC 2:

> "Section 2 has two subsections. Although the conduct described in 2(a) is apparently broad enough to overlap that described in 2(b), it is clear that section 2, taken as a whole, proscribes two distinct forms of conduct: (1) participation in a criminal plan involving others who act with a criminal state of mind, and (2) **the commission of a crime by the use of an innocent or irresponsible agent.** [Emphasis added.]

The evidence also indicates that in the third phone call of October 8, 1975, Buttram adopted and ratified the misrepresentations of Exum.

The court therefore adheres to its prior ruling at trial that Buttram is responsible for the actions of Exum so long as the government's evidence sustains the existence of an agency-principal relationship.

The government presented persuasive evidence at trial of an agent-principal relationship between Exum

and Buttram. For instance the representations by Exum to Baldwin concerning potential gold recoveries in excess of one million dollars a day were allegedly based on certain assay reports, Government's Exhibits 1-5, procured by Buttram. Barbara Smith, another government witness, testified that she made copies of these exhibits received from Buttram and gave them to Exum and another salesman, Brad Melton. Buttram admitted having given Exum two assays (G. Ex 1 and 2) with the specific intent of having Exum display these to potential investors. (T. 1199-1200) He also testified to travels to Kentucky, Tennessee, Alabama, Louisiana and Oklahoma with Exum allegedly to discuss oil recovery with investors. Buttram however admitted that the electrohydraulic process was discussed with at least two individuals during the trip. Mr. Baldwin described his impression of the Exum Buttram relationship as follows: "Mr. Exum's position was that of more or less of a salesman. Mr. Buttram was the man we were doing business with."

The defendant also argues that the jury's acquittal of Buttram on Counts 1 and 2 amounts to a finding that Exum was not Buttram's agent. With respect to this argument, the court would point out that there is no requirement that a jury explain its verdict and consistency in verdicts is not required. Hamling v. U.S., 94 S Ct 2887, 418 US 87, 41 L Ed 2d 590, rehearing denied 958 S Ct 157 (1974); US ex rel Wojtycha v. Hopkins, 517 F 2d 420 (3d cir 1975).

Therefore, it is improper to read anything into the jury's acquittal of Buttram on Counts 1 and 2. And at any rate, questions as to the admissibility of evidence are for the court, not the jury to decide.

The defendant's reliance on the case of Ashe v. Swenson, 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189 (1970) is also misplaced. In Ashe, the Supreme Court ruled that a defendant could not be tried for the robbery of one of six poker players after having been previously acquitted of the robbery of another of the poker players. This holding was based on the concepts of collateral estoppel and double jeopardy which clearly apply to a defendant facing two separate trials but clearly have no relevance to one defendant facing one trial on two or more counts.

For all of the above reasons, the first prong of the Green test has been met and testimony concerning the Exum phone calls is admissible under the hearsay exception found in Rule 801(d)(2)(C) or (D) of the Federal Rules of Evidence. The court will now proceed to discuss the Sixth Amendment confrontation problem.

California v. Green, supra, while announcing the divergence of the hearsay and confrontation issues, did not set up any test to determine when admissible

hearsay might violate the dictates of the confrontation clause in a criminal case. (See Footnote 1) The court ruled in Green that admission of the prior testimony of a witness did not violate the confrontation clause in light of the present right to cross examine the witness about prior statements.

The Supreme Court, however, had occasion to further elucidate upon the confrontation clause problem in the case of Dutton v. Evans, 400 US 74, 27 L Ed 2d 213, 91 S Ct 210 (1970). In Dutton the defendant was convicted of murder in a Georgia court; the state having presented 20 witnesses including an eyewitness who described in detail the defendant's participation with others in the murder. The trial court had admitted the testimony of a federal prisoner who said that an accomplice of the defendant's had told him in prison that if it had not been for the defendant "we wouldn't be in this now". The accomplice did not take the witness stand but the trial court ruled this evidence admissible under the co-conspirators exception to the hearsay rule.

Justice Stewart wrote a plurality opinion representing the views of three other justices. Stewart found that admission of the hearsay statements of the

1/ "We have no occasion in the present case to map out a theory of the Confrontation Clause that would determine the validity of all such hearsay 'exceptions' permitting the introduction of an absent declarant's statements." 26 L Ed 2d at 499.

prisoner did not violate the confrontation clause for two reasons: (1) this evidence was not crucial to the government or devastating to the defendant and the statement contained strong indicia of reliability. (See Footnote 2)

Justices Blackmun and Burger concurred in Stewart's opinion but added as "an additional reason for the result" that admission of the hearsay was "harmless error if it was error at all". 27 L Ed 2d at 228. Thus, it seems fair to say that six justices concurred in the substance of Justice Stewart's opinion.

2/ The court found the following indicia of reliability, 27 L Ed 2d at 227:

"First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."

Two opinions of the Third Circuit, both written in 1970, have discussed Green, supra and Dutton, supra. In United States v. American Radiator and Standard Sanitary Corp., 433 F 2d 174 (3d cir 1970), the court held that Green does not alter "our conclusion that we are bound by holdings that use of the co-conspirator exception does not violate the Confrontation Clause."

In United States v. Weber, 437 F 2d 327 (3d cir 1970), the court made the following comments about Green:

> "Green does not overturn established law that the Sixth Amendment permits the introduction of evidence through some exceptions to the hearsay rule.

The court made the following comment about Dutton:

> "During the current term, the Supreme Court has decided Dutton v. Evans, supra. Writing for a plurality, Mr. Justice Stewart has re-affirmed the understanding articulated in prior decision of the court that the Sixth Amendment does not prohibit the introduction of all hearsay evidence. Indeed, as indicated in Dutton the federal evidentiary rules of hearsay may be more stringent than the constitutional limits embodied in the Sixth Amendment."

In Weber, the court held that hearsay declarations of a dead co-conspirator were properly admissible against the defendant finding that the out of court

declarations possessed "the traditional hallmarks of reliability". The Third Circuit has not discussed Dutton since these two 1970 opinions.

It is thus apparent that Dutton and Green require the court to make a case by case determination as to whether hearsay declarations admissible under an exception to the rule must nevertheless be suppressed under the Sixth Amendment's confrontation clause. Several decisions have admitted such hearsay primarily due to its reliability, Weber supra and United States v. Puco, 476 F 2d 1099 (2d cir 1973); U.S. ex rel Henson v. Redman, 419 FS 678 (D.Del 1976), while other decisions have emphasized the peripheral significance of the evidence to the government's case. United States v. Adams, 446 F 2d 681 (9th cir) cert den 404 US 943, 92 S Ct 294, 30 L Ed 2d 257 (1971).

In this case, evidence of Exum's phone calls is admissible under the second aspect of Dutton — while there is little reliability in anything the mentally deranged Exum may have said, his statements were not crucial to the government nor devastating to the defense.

The fact that Buttram was acquitted of the first two counts of the indictment indicates that the jury discounted the importance of Exum's statements. Furthermore, the primary reliance placed by the jury on statements made by Buttram during the third phone call in reaching their verdict is clearly evidence from their request that the transcript of the third phone call

be read back by the court reporter. The court has also carefully reviewed this portion of the transcript and rules that the third phone call constitutes sufficient evidence of misrepresentations made by Buttram independently of Exum to overcome any confrontation objections arising from Dutton and Green. Also, we note that Buttram was present during the first part of the phone call and did not repudiate Exum's statements.

Baldwin testified that on October 8, 1975, he first spoke with Exum who introduced Buttram as "the man who was worth over five hundred million and who could buy and sell me ten times over". (T. 45-46). Baldwin testified further that his intent at this point was "to confirm the elements of the proposal which Frank Evans [a pseudonym of Frank Exum] had made to me, namely, that the gold was being extracted from these wells". (T. 46)

During the subsequent conversation, Buttram confirmed that "we are talking about gold and lots of it". (T. 49) and that "we are talking about real gold". (T. 108) Buttram further represented that he expected a total return of 200 million dollars a day from his total investments. (T. 47, 49, 120) Finally, Baldwin was careful to confirm the exact details of Exum's proposal with Buttram:

> "Q. All right, and so is it fair in saying that the bulk of all the things you know about this well and the process that we have talked about

> here as you testified that came from this gentleman called Exum.
>
> "A. Except that I tried in the conversation I had with Mr. Buttram on the elements of the proposal that Mr. Exum had outlayed during these number of conversations.
>
> "Q. That would be where you were to turn over a hundred seventy-five thousand.
>
> "A. The amount of money and the operating expenses, what the $175,000 was for and what we were going to get out of it and that gold was being extracted." (T. 118-119)

The court therefore determines that the jury's verdict of innocent as to the two phone calls from Exum to Baldwin coupled with the request to reread Baldwin's testimony about Buttram's statements indicates that the crucial and devastating evidence in the government's case was based on statements made by Buttram rather than Exum. The court would also observe that Mr. Baldwin was a substantial and well known local businessman whose word the jury was likely to trust. Additional evidence of Buttram's guilt will be discussed in the next section of this memorandum, infra.

For all of the above reasons, the court adheres to its ruling at trial that out of court statements by the allegedly deranged Exum were admissible in the government's case against Buttram.

(2) Weight of Evidence Supporting the Verdict.

The Supreme Court of the United States and this Circuit have articulated the proper standard for reviewing the evidence in support of a jury verdict as follows:

> "As was said by the Supreme Court in Glasser v. United States, 315 US 60, 62 S Ct 457, 86 L Ed 680 (1942): 'It is not for us to weight the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it.' " U.S. v. Delerme, 457 F 2d 156, (3d cir 1972).

This Circuit further stated in U.S. v. Hamilton, 457 F 2d 95, (3d cir 1972):

> "[E]vidence need not be inconsistent with every conclusion save that of guilt, provided it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt."

The nature of the representations made by Exum and Buttram to Mr. Baldwin have already been discussed at length. It remains for the court to determine that these representations were made Fraudulently as part of a scheme and artifice to defraud Mr. Baldwin so as to meet the requirements of the mail fraud statute 18 USC 1343. (See Footnote 3)

3/ The court instructed the jury that the essential elements of the government's proof in a wire fraud case were in accordance with Devitt and Blackmar Federal Jury Practice and Instructions §40.05.

To begin with, Buttram had to explain away to the jury the inherent incredibility of any scheme which could make one million dollars a day from one well or 200 million dollars a day from several wells by producing gold from water. The defendant concedes that there was never any significant possibility of gold or silver recovery from the Imperial Valley of California.

The defendant contends, however, that the machine actually works in the sense that it can extract gold or other metals from water. It is true that Dr. Wesley has a patent on the electrohydraulic process. The defendant further contends that Dr. Wesley put an erroneous formula on the assay report from the Silver States Laboratory (Government's Ex. No. 1) escalating the correct amount of the potential recovery from Jack Maisson's well in the Imperial Valley of California by a factor of thousands. Buttram allegedly relied on this inherently incredible assay report in making projections of recoveries of one million dollars a day and in trying to sell gold recovery machines for a period of over one year.

A number of factors undercut the reliability of this theory of the case. In the first place, Barbara Smith testified that Buttram directed her to remove his name from the assay reports (G. Ex 1-5); evidence which is consistent with an attempt to cover up responsibility for these assay reports.

Buttram was provided with two assay reports in

1975 which indicated that the potential recovery of gold and silver in the Imperial Valley of California was practically nil. On December 23, 1975, Dr. Frank Soday tested Jack Maisson's well at the request of a potential investory, M. B. Kay, and found that it contained practically no gold and silver. And on August 19, 1975, another potential investor had an independent assay performed by Effat Botros which showed that Dr. Wesley's machine had practically no effect on the gold and silver in the water and that very little gold or silver was in the water tested. (T. 479, 742-46).

Buttram never informed his two biggest investors, Sonny Daniels and Edmund Pruitt, of these two negative assays. Furthermore, Buttram falsely represented to Pruitt in the presence of Daniels that it was not necessary to check the assay reports because he had already done so. Buttram also never informed Pruitt and Daniels of the fact that Jack Maisson's well was plugged until at least September 6, 1975, after Pruitt had signed an agreement. (T. 542-716, 8)

Further misrepresentations by Buttram were testified to by Dr. Frank Soday. Buttram told Dr. Soday that he had worked on the process six years as a scientist (T. 325) and that tests from five independent laboratories around the country established that $283,000 a day in gold and silver could be removed from an abandoned CCC camp well in the Imperial Valley of California by machine capable of processing 60,000 gallons of water a day. Soday was positive that

Buttram said that five laboratories had tested the water with identical results. (T. 356-59).

Two points were strongly argued by the defendant as negating any intent to defraud. First, all of the witnesses' testimony was in accord on the point that Exum and Buttram represented that no money was to pass until Baldwin's representatives were satisfied with a demonstration of the machine. (See transcript of Baldwin Testimony, p. 38, 71, 76, 80, 89, 96, 97, 98, 99; transcript of FBI Agent Bokal's testimony p. 155-186; transcript of Barbara Smith's testimony p. 222-264; transcript of Dr. Wesley's testimony, p. 1052; transcript of Buttram's testimony p. 1199-1205) Yet the government's evidence disclosed that individual investors had put over $250,000 into the electro-hydraulic process in reliance on the assay reports supplied by Buttram. In addition, an individual named M. B. Kay was committed to a $150,000 investment on October 17, 1975, but withdrew after Buttram's arrest. Buttram was arrested in California before he had a chance to demonstrate the machine to the two FBI agents representing Baldwin.

Exum and Buttram therefore may have felt it possible to con Baldwin into investing a large sum of money in an untested and unworkable project based on the false projections in the assay reports. There was some evidence presented at trial that the machine does work in the sense that it can extract some sediment from water. Thus, Baldwin's representatives may have

been shown some small quantites of gold and been led to invest in reliance on the false projections in the assay reports. The court also notes that a scheme and artifice to defraud need not be successful to violate the mail fraud statute. (See Footnote 4)

The second point strongly pressed by the defendant as negating any intent to defraud is the fact that Buttram worked on the machine in the Imperial Valley of California after his arrest in October 1975 to April 1976 and invested large sums of his own money. However, this conduct is consistent with an attempt to cover up or to create an impression of legitimacy in the gold recovery process. By this time, Buttram had been told by at least four people of the inaccuracy of the inflated assay reports: Dr. Soday, Effat Buttros, Dr. Wesley and his own attorney, himself a Ph.D. in electrical engineering who informed Buttram in his office that the key equation in G Ex 1 — one milligram equals one ounce — was false. To continue to press forward with the project in the face of such overwhelming evidence of its impracticality would seem to be consistent with an elaborate cover-up.

For all of the above reasons, the court has concluded that the evidence viewed in the light most favorable to the government, substantially supports Buttram's conviction of wire fraud. It remains to consider a few miscellaneous objections to rulings at

4/ The jury was instructed in this regard according to Devitt and Blackmar Federal Jury Practice §40.09, Gist of the Offense.

trial now raised by the defendant.

(3) Miscellaneous arguments of the Defendant.

At one point in the testimony of Baldwin at trial, the court directed Buttram to state: "We are talking about gold." (T.111) so that Baldwin could identify Buttram's voice. Baldwin did identify the voice, stating: "The voice I heard was the same voice." (T. 112). The defendant argues that this evidence should not have been admitted because it is inherently suggestive in violation of Stovall v. Denno, 87 S Ct 1967, 388 US 293, 18 L ed 2d 1199 (1967).

However, two circuits have recently ruled that a witness may testify as to his recognition of the accused's voice, provided he had some basis for comparison of the accused's voice with the voice which he identifies as the accused's. US v Ladd, 527 F 2d 1341 (5th cir 1976); US v Turner 528 F 2d 143 (9th cir 1975). The court would also observe that it is now established that a defendant has no constitutional right to a line-up. US v. Estremera 531 F 2d 1101 (2d cir 1976). Although this principle usually applies to physical comparisons, the same principle would seem to apply to a line-up to compare voices. The court thus rules that it was proper for Buttram to make an in court statement so that Baldwin could identify his voice.

A second miscellaneous argument of the defendant is that the FBI agents who traveled to Texas and California as Buttram's agents illegally seized G Ex 1-5 from Barbara Smith. The court fails to see how Buttram

has any standing to object to this seizure since the evidence at trial disclosed that Buttram gave these exhibits to Exum as his salesman to show to third parties to induce purchases of gold recovery machines. Thus, Buttram authorized delivery of these exhibits to the two FBI agents who represented themselves as prospective purchasers of the machine.

The defendant's motion for new trial has therefore been denied.

s/William W. Knox
United States District Judge

CC:

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-1946

UNITED STATES OF AMERICA
vs.
BUTTRAM, MYRON,
Appellant.
(D.C. Crim. No. 76-30-2)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
January 5, 1978
Before GIBBONS, GARTH, Circuit Judges, and
WEINER,* District Judge

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* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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JUDGMENT ORDER

In this appeal from a judgment of sentence for violation of 18 U.S.C. §§ 1343 and 2, the defendant contends:

(1) that the District Court erred in admitting evidence of statements made to J. Robert Baldwin by Frank Exum in furtherance of an alleged scheme to use interstate wire facilities to obtain money by fraud;

(2) that there was insufficient evidence of any fraudulent intent on the part of the defendant, because

(a) there was evidence that the defendant believed in the efficacy of Dr. Wesley's method of removing gold

from water;

(b) there was evidence that Baldwin was to place his investment in escrow until satisfied that the Wesley process worked; and

(3) that the court should have suppressed exhibits used in furtherance of the scheme which were displayed to agents of the Federal Bureau of Investigation posing as representatives of a potential investor.

The evidence of Exum's statements was properly admitted. On this record defendant's intent was an issue for the jury. We find no error in admitting the exhibits.

It is therefore O R D E R E D and A D J U D G E D that the judgment of the District Court is affirmed.

By the Court,

s/John J. Gibbons
Circuit Judge

Attest

s/Thomas F. Quinn,
Thomas F. Quinn,
Clerk

Dated: January 6, 1978

PROOF OF SERVICE

State of California)
ss
County of Riverside)

t I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within entitled action. My business address is 1509 N. Main Street, Santa Ana, California 92701.

I served the within

PETITION FOR WRIT OF CERTIORARI
on the
interested parties in said action, by placing a true copy in each of three sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed to:

U.S. Solicitor General
Department of Justice
Washington, D.C. 20530

U.S. Attorney
Western District of Pennsylvania
Attention: James West, Esq.
U.S. Courthouse
Pittsburgh, Pennsylvania

U.S. District Judge
William W. Knox
U.S. Courthouse
Erie, Pennsylvania 16501

I CERTIFY under penalty of perjury that the foregoing is true and correct. Executed on 4 February 1978 at Santa Ana, California.

JACK GALLAGHER

Supreme Court, U. S.
FILED
APR 6 1978
MICHAEL RODAK, JR., CLERK

No. 77-1099

In the Supreme Court of the United States

OCTOBER TERM, 1977

MYRON BUTTRAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1099

MYRON BUTTRAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court improperly admitted testimony recounting out-of-court statements of an accomplice and that the evidence was insufficient to support his conviction.

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343 and 2. He was sentenced to two years' imprisonment and fined $1,000. The court of appeals affirmed (Pet. App. 72-74).

The evidence at trial showed that in the fall of 1975 petitioner and Frank Exum[1] participated in a fraudulent

---

[1]After government psychiatrists determined that Exum was mentally ill, the charges against him were dismissed at the government's request (Pet. App. 51).

scheme to solicit investments in machines they asserted were capable of profitably extracting gold and silver from thermal well waters in the Imperial Valley of California. On October 1, 1975, Exum telephoned a Pennsylvania businessman, J. Robert Baldwin, and offered him a 25 percent interest in such a machine for $175,000 (Pet. App. 51-52). Exum told Baldwin that the machine was producing one million dollars worth of gold a day. Baldwin suspected, however, that Exum's offer was fraudulent and alerted the F.B.I. The following day, in the presence of an F.B.I. agent, Baldwin called Exum, who confirmed the terms of his offer (Pet. App. 52).

On October 8, 1975, Baldwin talked by telephone with both Exum and petitioner; Exum came on the line first and then introduced petitioner as "[a] man who [is] worth over five hundred million and who could buy and sell [him] ten times over" (Tr. 45-46). Petitioner himself then told Baldwin that gold was being extracted from the wells and that "we are talking about gold and lots of it." He in fact represented that his mineral extracting enterprises would make profits of 200 million dollars a day (Tr. 49). Petitioner also reconfirmed the exact details of Exum's original proposal, including that Baldwin would not pay for operating costs and that Baldwin could, if he wished, buy shares of additional machines (Tr. 46-49, 118-119). Later that day, petitioner was arrested in California after he and Exum had repeated their misrepresentations to two F.B.I. agents who were posing as Baldwin's representatives (Tr. 127-150).[2] The October 8, 1975,

[2]There was evidence that other investors had put over $250,000 into the process, in reliance on an assay report supplied by petitioner, and that one other investor had committed an additional $150,000 (Pet. App. 68).

conversation formed the basis of petitioner's conviction for wire fraud.[3]

1. Petitioner contends (Pet. 16-24) that testimony of Baldwin and F.B.I. Agent Bokal concerning statements made by Exum in telephone conversations with Baldwin was inadmissible hearsay. Exum's statements, however, were not recounted to prove the truth of the matters asserted by him—*i.e.*, that there existed a machine capable of extracting gold from water at a phenomenal rate—but rather were introduced as the *corpus delicti* of the crime of wire fraud. They therefore could not be hearsay, and they were properly admitted. See Fed. R. Evid. 801(c); *United States* v. *McDonnel*, 550 F. 2d 1010, 1012 (C.A. 5), certiorari denied, No. 76-1829, October 3, 1977; *United States* v. *Burke*, 495 F. 2d 1226, 1232 (C.A. 5), certiorari denied, 419 U.S. 1079; *United States* v. *Tyminski*, 418 F. 2d 1060, 1062 (C.A. 2), certiorari denied, 397 U.S. 1075.

Nor is petitioner correct in asserting (Pet. 22) that admission of testimony about Exum's statements violated his right of confrontation. "From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard." *Dutton* v. *Evans*, 400 U.S. 74, 88 (footnote omitted). Here, Baldwin and Agent Bokal were available for cross-examination as to the relevant fact—Exum's utterance of the statements in question.

In addition, as the district court concluded (Pet. App. 56-58), since there was "persuasive evidence at trial of an

[3]The earlier calls involving only Exum were the basis for two additional counts, on which petitioner was acquitted (Pet. App. 52).

agent-principal relationship between Exum and [petitioner]," as well as evidence that petitioner "adopted and ratified [Exum's] misrepresentations" during the October 8 telephone conversation, testimony concerning Exum's statements was admissible as the statement of an agent under Fed. R. Evid. 801(d)(2)(C) or (D).[4] In any event, as the court further observed (Pet. App. 62-63), petitioner could not have been harmed by the cumulative effect of admission of Exum's statements. Petitioner's own statements during the October 8 conversation with Baldwin outlined all the elements of the proposal and standing alone were sufficient to support his conviction of wire fraud.

2. Petitioner next contends (Pet. 25-48) that there was insufficient evidence of intent to defraud to support his conviction.[5] But as the court below correctly concluded

[4]Rule 801 provides:

> (d) **Statements which are not hearsay.** A statement is not hearsay if—
>
> * * * * *
>
> (2) * * * The statement is offered against a party and is * * * (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship * * *.

[5]Petitioner also asserts (Pet. 9, item 6) that, as a matter of law, he could not violate 18 U.S.C. 2(b) by "willfully caus[ing] an act to be done [by Exum] which if directly performed by him * * * would be an offense," because Exum lacked legal capacity to commit a crime. The court instructed the jury as to the elements of a violation of 18 U.S.C. 2 (contrary to petitioner's assertion, Pet. 9, item 5) and correctly stated that whether Exum was mentally competent or not was irrelevant (Tr. 1498). Section 2(b) reaches the use of an innocent or irresponsible agent and does not require criminal intent on the part of the agent. *United States* v. *Lester*, 363 F. 2d 68, 73 (C.A. 6), certiorari denied, 385 U.S. 1002; *United States* v. *Inciso*, 292 F. 2d 374, 378 (C.A. 7).

(Pet. App. 69), "the evidence viewed in the light most favorable to the government substantially supports [petitioner's] conviction of wire fraud." Evidence that petitioner had made the alleged representations concerning his scheme to extract gold from well waters in California was uncontradicted. Moreover, the evidence disclosed that "[petitioner] had been told by at least four people of the inaccuracy of the inflated assay reports," and indeed he "conced[ed] that there was never any significant possibility of gold or silver recovery from the Imperial Valley of California" (Pet. App. 66, 69).

Finally, contrary to petitioner's view (Pet. 47-48), it is settled that a fraudulent scheme need not bear fruit for the wrong-doer or cause injury to the intended victim in order to violate the wire fraud statute. The statute only requires that a scheme be devised and the telephone be used as a step in executing the scheme. See *United States* v. *Pollack*, 534 F. 2d 964, 971 (C.A.D.C.), certiorari denied, 429 U.S. 924; *Huff* v. *United States*, 301 F. 2d 760, 765 (C.A. 5), certiorari denied, 371 U.S. 922.[6]

[6]Petitioner relies (Pet. 47-48) on language relating to the mail fraud statute in *United States* v. *Baren*, 305 F. 2d 527, 528 (C.A. 2), and in *United States* v. *Rabinowitz*, 327 F. 2d 62, 76 (C.A. 6) (quoting *Baren*), that "[i]n every mail fraud case * * * some person or persons must have been defrauded." But as the Second Circuit later noted in *United States* v. *Andreadis*, 366 F. 2d 423, 431, certiorari denied, 385 U.S. 1001, the passing statement in *Baren*, *supra*, was not intended to overrule the well-established principle that, in order to establish mail fraud, it is not necessary to prove that persons are actually defrauded. Rather, *Baren* meant only that, in those cases where the product can actually do what is advertised, the government must produce evidence that purchasers were nonetheless in some way defrauded. *Baren*, as construed by *Andreadis*, is clearly not applicable here, since petitioner's wells were patently incapable of performing as advertised.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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